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No. 92-369

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

THEODIS MILLBROOK, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly denied petitioner's request for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1992. A petition for rehearing was denied on August 6, 1992. Pet. App. 17. The petition for certiorari was filed on August 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Over an eleven year period, petitioner Theodis Millbrook filed three separate applications with the

Social Security Administration (SSA) seeking disability benefits due to a heart condition that allegedly became disabling in 1976. This case concerns petitioner's entitlement under the Equal Access to Justice Act (EAJA) to attorney's fees incurred in the course of an unsuccessful appeal from the denial of his second application.

1. Petitioner's first application for disability benefits was filed on January 17, 1977. The SSA awarded petitioner disability benefits for a period of disability beginning April 20, 1976. On December 18, 1981, however, the SSA notified Millbrook that it had determined that his disability had ended in November 1981, and it accordingly terminated benefits in January 1982. Petitioner did not file a request for reconsideration within 60 days after he received his notice of termination of benefits, nor did he appeal the determination. See *Millbrook* v. *Heckler*, 780 F.2d 1371, 1372 (8th Cir. 1985).

2. Approximately seven months later, petitioner filed a second application for disability benefits, again claiming that he had been disabled since April 20, 1976, due to heart trouble. The second application was denied at all administrative levels, and petitioner sought review in federal district court. The district court denied any relief to petitioner. On appeal, the Eighth Circuit affirmed, concluding that substantial evidence supported the Secretary's determination that petitioner could perform sedentary work despite his heart condition. 780 F.2d at 1374. Petitioner sought no further review of that decision.

3. On January 2, 1986, petitioner filed a third application for disability benefits, again alleging disability

from hypertension and angina since April 20, 1976. This application was also denied through all administrative levels. Petitioner then brought a new suit in federal district court, seeking review of the Secretary's denial of the benefits sought in his third application. The district court twice remanded the case to the agency for further administrative proceedings so that the Secretary could consider new medical evidence. On April 21, 1992, during the course of the second remand, the administrative law judge awarded petitioner disability benefits. Petitioner accordingly sought dismissal of his action in the district court, which the court entered on May 11, 1992. No issues concerning petitioner's third application were ever presented to the court of appeals.

4. After petitioner prevailed on his third application for benefits, he filed two nearly identical motions for attorney's fees and expenses under EAJA: one in the district court and one in the court of appeals. The petition for attorney's fees in the district court was referred to a magistrate judge and is still pending. Only petitioner's claim for attorney's fees in the court of appeals is at issue here.

In his fee petitions, petitioner noted that he had achieved his original goal of obtaining disability benefits dating back to December 1981, when the SSA had terminated his benefits. He therefore claimed that he was entitled to all fees incurred in both the district court and the court of appeals after May 31, 1983, when he first brought suit in the district court to gain those benefits. The Secretary objected to an award of EAJA fees and expenses for time spent before the court of appeals on the ground that

petitioner had lost, not prevailed, on the only issue presented to that court in 1985: the denial of petitioner's second (July 1982) application for benefits.

On June 26, 1992, the court of appeals denied petitioner's fee petition. Pet. App. 16. The court denied rehearing on August 6, 1992. Pet. App. 17.

ARGUMENT

Petitioner contends that he was entitled to attorney's fees under EAJA for an unsuccessful appeal of the denial of his second application for benefits based solely on the fact that he subsequently obtained benefits on a third application. The decision of the Eighth Circuit denying petitioner EAJA fees for an unsuccessful appeal to that court was correct, however, and does not conflict with any decision by this Court or by any other court of appeals. Further review is therefore unwarranted.

1. To qualify for EAJA fees, a litigant must have been a "prevailing party" in a "civil action" against the United States.[1] The court of appeals correctly concluded that petitioner was not a "prevailing party" in any "civil action" before that court.

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[1] EAJA provides, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action * * * including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A).

The "civil action" before the Eighth Circuit was a suit challenging the Secretary's denial of petitioner's second application for benefits. Petitioner clearly did not prevail in that "civil action," because the court of appeals affirmed the Secretary's denial of benefits. 780 F.2d at 1374. As petitioner admits, Pet. 6, he did not seek further review of the court of appeals' decision and instead filed a completely new application for disability benefits in January 1986. Consequently, the "civil action" challenging the denial of benefits sought in the second application became final. Because petitioner never prevailed in the civil action before the court of appeals, he is not entitled to an award of EAJA fees in connection with that litigation. See *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 489 U.S. 782, 791 (1989) ("A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.").

Petitioner essentially attempts to merge two distinct civil actions. Each final decision of the Secretary is reviewable by a separate "civil action." *Sullivan* v. *Finkelstein*, 496 U.S. 617, 624-625 (1990). Petitioner accordingly brought two "civil actions," one challenging the Secretary's denial of his second application and one challenging the Secretary's denial of his third application. For EAJA purposes, a "civil action" may include proceedings before the agency after certain types of remands, if the claimant's suit remains pending in federal court. See *Sullivan* v. *Hudson*, 490 U.S. 877, 892 (1989); *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2162 (1991). But the Eighth

Circuit's 1985 decision finally rejected petitioner's challenge to the Secretary's denial of his second application. No remand to the agency resulted from that decision.

Petitioner contends that his status as a prevailing party was "not dependent on an affirmative *court* decision. Rather, the key factor is that the claimant ultimately received the benefits he sought." Pet. 9-10. The Secretary agrees that a claimant must have been awarded benefits to be a "prevailing party" under EAJA. See *Hudson*, 490 U.S. at 886-887 (award of benefits on remand to agency makes a Social Security claimant a "prevailing party" for EAJA purposes); *Swedberg* v. *Bowen*, 804 F.2d 432, 434 (8th Cir. 1986) (to be a "prevailing party" under EAJA a disability benefits claimant "must obtain those benefits which he sought on the original appeal to the district court"); *Brown* v. *Secretary of HHS*, 747 F.2d 878, 883 (3d Cir. 1984) ("it is the receipt of * * * benefits that renders a typical Social Security plaintiff a prevailing party"); *McGill* v. *Secretary of HHS*, 712 F.2d 28, 32 (2d Cir. 1983) (a Social Security claimant "will not become a prevailing party unless and until she is awarded benefits"). But the EAJA fees sought must have been incurred in the "civil action" that resulted in "prevailing party" status. The relief that petitioner obtained on his third application was similar to that which he had sought in his second application, but he ultimately prevailed because of the separate "civil action" brought to review the denial of his third application.[2] The court of appeals therefore properly

[2] The Secretary accordingly does not dispute that petitioner is a "prevailing party" within the meaning of EAJA in the

denied petitioner any fees for his unsuccessful appeal of the denial of his second application. Cf. *Hensley* v. *Eckerhart*, 461 U.S. 424, 435 (1983) (no fees appropriate for work on unsuccessful distinct claims).

2. Contrary to petitioner's contention, the decision of the court of appeals does not conflict with those of other circuits. Petitioner's reliance, Pet. 9-10, on *Green* v. *Bowen*, 877 F.2d 204, 206 (2d Cir. 1989), is misplaced. In *Green*, a Social Security disability claimant filed a mandamus action to compel the Secretary to process his request for reconsideration of the denial of benefits after the Secretary refused to process the request on timeliness grounds. The parties stipulated to a dismissal of the mandamus action after the SSA voluntarily reopened Green's claim. Although the SSA ultimately awarded Green the disability benefits that he had been seeking, the district court held that Green was not a prevailing party because he had not prevailed in a civil action reviewing a final agency determination. 877 F.2d at 205-206. The Second Circuit reversed, essentially holding that the mandamus action had been a catalyst for the eventual award of benefits, making Green a

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"civil action" seeking review of his *third* application for benefits. After the Secretary initially denied that application, petitioner sought review in the district court by bringing a new civil action and, after several remands for additional evidence, ultimately succeeded in obtaining benefits. Even as to the third application, however, the Secretary contends that his position was "substantially justified," precluding any award of fees under 28 U.S.C. 2412(d)(1)(A). See Def. Response to Pltf. Mot. for Atty's Fees and Other Expenses Pursuant to the Equal Access to Justice Act, No. J-C-88-36 (E.D. Ark. filed Aug. 18, 1992).

prevailing party within the meaning of EAJA. *Id.* at 206.

In this case, petitioner's unsuccessful appeal to the Eighth Circuit was in no sense a catalyst for the subsequent award of benefits. Unlike Green, petitioner undeniably lost before the Eighth Circuit. Petitioner won his benefits not on a remand from the court of appeals, but on a remand from the district court in a new civil action based on a separate application for benefits supported by new and different evidence. Because the Eighth Circuit's decision in no way led to petitioner's ultimate success in gaining benefits, the court of appeals properly denied his request for fees for work before that court. None of the cases cited by petitioner suggests a contrary result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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